

No. 812 34

In the Supreme Court of the United States

OCTOBER TERM, 1940

TEXTILE MILLS SECURITIES CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT*

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case.

There are two major questions presented:

1. Whether a circuit court of appeals may be composed of all the circuit judges of the circuit in active service, more than three in number, sitting *en banc*.

2. Whether there may be deducted as an ordinary and necessary expense under Section 23 (a) of the Revenue Act of 1928 payments to persons engaged

by the taxpayer to provide publicity and prepare propaganda as an aid to the taxpayer's undertaking, pursuant to a contingent fee contract, to obtain the enactment of congressional legislation beneficial to its principal.

The first question raises an important issue as to the structure of the circuit courts of appeals. It is in the public interest that the question be authoritatively settled, particularly since the decision below in this respect is contrary to the views expressed in *Lang's Estate v. Commissioner*, 97 F. (2d) 867, 869 (C. C. A. 9th).

If the petition is granted, we do not oppose review of the second question, in order that the merits of the tax controversy may also be before the Court. In the event that the Circuit Court of Appeals be reversed on the procedural and jurisdictional point, a determination of the substantive issue would become desirable in order to facilitate disposition of the proceeding. It would avoid questions that might otherwise arise, in view of the differing opinions held by the judges of the Circuit Court of Appeals, as to the status of the case and its future consideration.

The question on the merits does not, however, present any direct conflict among the circuits, as alleged by petitioner (Pet. 12). The decision below is in accord with a similar result reached in *Sunset Scavenger Co. v. Commissioner*, 84 F. (2d) 453 (C. C. A. 9th), where deductions for lobbying

expenses were denied. Cf. *Old Mission P. Cement Co. v. Commissioner*, 69 F. (2d) 676, 681 (C. C. A. 9th),¹ affirmed on other issues, 293 U. S. 289.² Although deductions have been allowed, erroneously, we believe, in two somewhat comparable cases in the Fifth Circuit, the court nevertheless indicated that it regarded as distinguishable cases involving lobbying or contracts that are unenforceable as against public policy. *Lucas v. Wofford*, 49 F. (2d) 1027, 1028; *Alexandria Gravel Co. v. Commissioner*, 95 F. (2d) 615, 616. Two other circuit court of appeals decisions alleged (Pet. 12) to be in conflict, *Sullivan v. United States*, 15 F. (2d) 809, 810 (C. C. A. 4th), and *Steinberg v. United States*, 14 F. (2d) 564 (C. C. A. 2d), must be read in the light of this Court's reversal of the *Sullivan* decision (274 U. S. 259) and the decision of the Circuit Court of Appeals for the Second Circuit, subsequent to the *Steinberg* case, in *Burroughs Bldg. Material Co. v. Commissioner*, 47 F. (2d) 178.

There is no conflict, moreover, on the question of the validity of the contracts here in question. The cases cited at page 12 of the petition for certiorari

¹ In the light of these decisions by the Circuit Court of Appeals for the Ninth Circuit it is plain that *Heleering v. Hampton*, 79 F. (2d) 358 (C. C. A. 9th), relied upon by petitioner (Pet. 12), does not present a conflict. The *Hampton* case involved the deductibility of amounts paid on a rescission suit, and is not regarded by the same court as a precedent with respect to lobbying expenses.

² This Court in effect denied certiorari on this issue in the *Old Mission* case when it limited the writ (293 U. S. 544).

deal with undertakings that are readily distinguishable. As the court pointed out, contracts virtually identical with those now in issue were recently held unenforceable by the Court of Appeals for the District of Columbia, and certiorari was denied. *Gesellschaft Fur Drahtlose Telegraphie, M. B. H. v. Brown*, 78 F. (2d) 410, certiorari denied, 296 U. S. 618; *Brown v. Gesellschaft Fur Drahtlose Telegraphie, M. B. H.*, 104 F. (2d) 227, certiorari denied, 307 U. S. 640.

The Circuit Court of Appeals decided that as a matter of law expenses of the character in question were not ordinary and necessary within the meaning of Section 23 (a) of the statute. In thus reversing the Board of Tax Appeals, the court did not, as alleged in the petition (p. 13), depart from the accepted course of judicial procedure, or shift the ground upon which the case had previously been considered.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MARCH 1941.